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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In re Application of)

GAF BROADCASTING COMPANY, INC.)

For Renewal of the License)
of FM Broadcast Station)
WAXQ (Formerly WNCN),)
New York, New York)

MM Docket No. 93-54

File No. BRH-910201WL

To: The Commission

OPPOSITION TO AND MOTION TO STRIKE APPLICATION FOR REVIEW

GAF Broadcasting Company, Inc. ("GAF"), the licensee of WAXQ(FM), New York, New York, by its attorneys and pursuant to Section 1.115(d) of the FCC rules, herein opposes the unauthorized and baseless Application For Review filed December 23, 1993 by Listeners' Guild, Inc. (the "Guild").¹ The Guild has no standing whatsoever to seek review from the order terminating a comparative proceeding in which it was not a party, and in any event raises no argument on the merits of that order. Nor is an unauthorized appeal necessary to preserve its right to appeal other orders, which are already on appeal before the Commission and Court of Appeals. Accordingly, the Guild's latest attempt to obstruct the station's renewal must be stricken.

¹Due to a delay in receiving the Guild's appeal, GAF requested an extension of time until today in which to file this Opposition. That extension was unopposed.

Background

The Guild has long sought to interfere with GAF's discretion over the entertainment format of WAXQ(FM) and its predecessor, WNCN(FM), and repeatedly attempted to disqualify the station's licensees over the past two decades. (For the sake of convenience, the station is referred to by its former call sign hereafter.) In 1991, the Guild petitioned to deny renewal of WNCN for the third time. The Hearing Designation Order in this proceeding, which designated a comparative hearing between GAF and two competing applicants, rejected all of the Guild's allegations against GAF (with the exception of those concerning the station's EEO record, which remain pending before the EEO Branch).² Thus, the HDO denied the Guild party status. Subsequently, the Administrative Law Judge, Review Board (twice) and Commission have all consistently rejected the Guild's repeated requests for hearing issues and intervention in the comparative hearing.³ After the only remaining competitor requested voluntary dismissal,⁴ the Presiding Judge granted its request,

²Hearing Designation Order, 8 FCC Rcd 1742 (ASD 1993).

³Memorandum Opinion and Order, FCC 93-385, released August 16, 1993; Memorandum Opinion and Order, FCC 93M-360, ALJ Chachkin, released June 15, 1993; Memorandum Opinion and Order, FCC 93R-50, Rev. Bd, released September 13, 1993; Memorandum Opinion and Order, FCC 93R-61, Rev. Bd, released November 23, 1993. These decisions mirror those arising from GAF's 1981 renewal application, when the Presiding Judge, Review Board, Commission and U.S. Court of Appeals all rejected the Guild's attempt to intervene in the comparative renewal proceeding. See Listeners' Guild Inc. v. FCC, 813 F.2d 465 (D.C. Cir. 1987).

⁴A competing application filed by the Guild's former Chairman was previously dismissed for failure to prosecute.

terminated the comparative proceeding and granted GAF's renewal application (subject to completion of the EEO Branch's review, as prescribed by the HDO).⁵

Despite its admitted lack of party status, the Guild filed an "Appeal" of the Presiding Judge's Order with the Review Board on October 18, 1993, which the Mass Media Bureau opposed. Moreover, the Guild yet again sought hearing issues against GAF (discussed below), which the Mass Media Bureau opposed as "border[ing] on an abuse of the Commission's processes," an apparent "means to continue to harass the licensee," and "a waste of public resources" which should not be condoned. The Review Board properly rejected the Guild's appeal and issue requests as "unauthorized, repetitive, and frivolous."⁶

The Guild Has No Standing To Appeal The Termination Of A Comparative Hearing In Which It Was Repeatedly Denied Party Status.

The Review Board properly concluded the Guild was without standing to "appeal" the Presiding Judge's order. Section 1.302(a) of the FCC rules authorizes only parties to a comparative proceeding to appeal a presiding officer's ruling which terminates that proceeding. The Guild's only options, which it has already taken, are appeals of the HDO and interlocutory order denying its issues and intervention requests. Thus, the Board's Order was hardly arbitrary, capricious and prejudicial, as the Guild claims, but in perfect accordance with the FCC rules.

⁵Memorandum Opinion and Order, FCC 93M-593, ALJ Chachkin, released September 17, 1993.

⁶Memorandum Opinion and Order, FCC 93R-61 at ¶ 4.

The Guild acknowledges its total lack of standing, but asserts that the FCC rules require it to file an application for review in order to preserve its statutory "right" to a judicial appeal of the renewal grant. According to the Guild, its petition to deny GAF's renewal gives it a right to appeal the order granting conditional renewal.

GAF submits that the Guild has no specific statutory right to appeal from the Judge's order terminating the comparative hearing. Section 402(b)(6) of the Communications Act provides that only a "person who is aggrieved or whose interests are adversely affected" by an order granting a license renewal may bring a judicial appeal. The Guild's only potential claim to such status stems from its filing of a petition to deny GAF's renewal application. Pursuant to Section 309(d) of the Communications Act, a petition to deny causes the designation of a renewal application for hearing only where the petitioner has demonstrated the existence of substantial and material allegations of fact that, if true, would make a grant of the application prima facie inconsistent with the public interest, convenience and necessity. Under this standard the HDO rejected the Guild's issue requests.

In short, the Guild had the opportunity in its petition to deny to show that it would be aggrieved or that its interests would be adversely affected by a grant of GAF's renewal application. When the HDO terminated the Guild's right to participate further in the renewal proceeding, this triggered the exclusive avenue for appeal by the Guild of its unsuccessful objections to the renewal of WNCN. See 47 C.F.R. Secs. 1.104(b), 1.106(a)(1). Similarly, when the Presiding Judge in the comparative proceeding denied the Guild's motions to enlarge and intervene, his order triggered the Guild's only avenue for appeal of those matters. See 47 C.F.R. Sec. 1.301(a)(1).

Thus, the Guild has not been deprived of any right, under the Communications Act or FCC rules, to appeal the denial of a hearing on its assorted allegations. It already has appeals pending before the Commission and U.S. Court of Appeals for the D.C. Circuit (Docket Nos. 93-1618 and 93-1687), and there is no reason to believe these appeals will not be heard. Thus, the Guild has taken every legitimate avenue of appeal provided by the statute and rules. If the Court of Appeals or Commission were to reverse the relevant orders on appeal, the Guild could then seek to participate in any hearing designated. Further, the Commission's EEO Branch is currently reviewing WNCN's EEO record, a proceeding in which the Guild has been permitted to participate by filing comments. Renewal of WNCN's license has been expressly conditioned on the outcome of this review. In short, the Guild's inability to appeal this particular order has in no way prejudiced it.

Moreover, as the Review Board reasoned, the Guild asserts no substantive error in the Judge's order terminating the comparative hearing. Thus, even if the Guild had standing, it has not really appealed anything in that order. Surely, the Guild could not force a company which no longer seeks to pursue the WNCN frequency to continue to prosecute its competing application, against its wishes. The Commission should not countenance the Guild's latest, unauthorized attempt to obstruct the WNCN renewal.

The Guild Has Waived Review Of Its Latest Issue Requests.

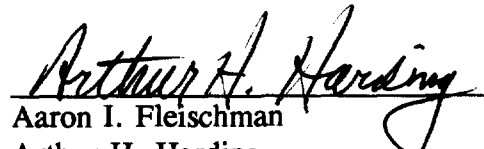
The Guild does not even address the Board's denial of its latest issue and intervention requests. Accordingly, its right to review of those matters has been waived. Moreover, as the Board properly noted, the Guild failed to meet, or even address, the standards for

reopening the record to add issues, and the Guild predicated its allegations on a pending civil lawsuit in state court, absent any final adjudication, contrary to well-established FCC policy.

The Guild has absolutely no authority to bring the present Application For Review. Nor is an unauthorized appeal necessary to preserve other allegations already on appeal. On the contrary, the Guild seeks to yet again misuse the FCC processes to harass GAF. By now the Commission is all too familiar with the Guild, which has buried the licensees of WNCN, the Commission and the courts with an avalanche of petitions and appeals over nearly 20 years. This is the third time that the Guild has unsuccessfully challenged the renewal of WNCN. It has already taken its appeals of that challenge. The Guild's latest attempt to harass GAF should thus be stricken or denied.

Respectfully submitted,

GAF BROADCASTING COMPANY,
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DATED: January 12, 1994
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CERTIFICATE OF SERVICE


I, Eve J. Lehman, a secretary at the law firm Fleischman and Walsh, hereby certify that I have this 12th day of January, 1994, placed a copy of the foregoing "Opposition To Application For Review" in U.S. First Class Mail, addressed to the following:

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